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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re K.B. et al., Minors.

J.Y., JR.,

Petitioner and Respondent,

v.

R.B.,

Objector and Appellant.

F058134

(Super. Ct. No. VAD006816)

OPINION

APPEAL from an order of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Kimball J.P. Sargeant, under appointment by the Court of Appeal, for Objector and Appellant.

Kliever Law Group and Richard L. Kliever for Petitioner and Respondent.

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R.B. (father) and C.G. (mother) are the biological parents to two children, K.B. and A.B. (the children). Mother has had custody of the children throughout their lives. Father has spent the majority of the children's lives in prison. J.Y., Jr., stepfather,

married mother and filed two petitions to adopt, one for each child. Mother consented to the adoptions without relinquishing her parental rights. The petitions to adopt sought to achieve the adoptions without the necessity of obtaining father's consent. Stepfather also filed separate petitions to terminate father's parental rights¹ pursuant to Family Code sections 7822 and 8604.² The family court granted the petitions and terminated father's parental rights. Father argues the family court erred because the resulting judgment was not supported by substantial evidence.³ We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Stepfather claimed that father had willfully abandoned the children by failing to pay support and by failing to communicate with them for a period in excess of one year. Father's absence from the children's lives can be attributed to his drug dependency and resulting criminal behavior. We begin with the periods father was incarcerated.

I. Periods of Incarceration

Father began using drugs when mother was pregnant with the youngest child. Father was arrested for burglary in 2001. He was in jail from December 26, 2001, to August 2002. He was then placed in a drug rehabilitation program until he was released in March 2003. Mother would visit father with the children while he was at the facility. When he was released in 2003, mother and father attempted to reconcile. The efforts at reconciliation ended when father again began using illegal drugs. Father was returned to custody in February 2004 for violating his parole. Father was released from custody in August 2005. He returned to custody in December 2005. He was released in March

¹The petitions also were signed by mother, even though she was not a party to the action.

²All further statutory references are to the Family Code unless otherwise indicated.

³Father's notice of appeal was filed before judgments had been entered in this case. On father's unopposed application, we deemed his notice of appeal to be from the final judgments entered on October 20, 2009.

2006, but was returned to custody that same month for another burglary. He was released from custody in June 2008.

Thus, father was in prison/rehabilitation for 15 months during 2001-2003, 19 months during 2004-2005, and 30 months during 2005-2008. He did not have any contact with the children while he was incarcerated after 2003. As will be established, his attempts to communicate with the children by writing were frustrated by mother.

II. Mother's Testimony

Mother confirmed that father is the biological father of the children, and that she is married to stepfather. Mother and father lived together for 18 months during 1997 and 1998 and again for one month in 2003. The period of living together in 2003 was preceded by a period of reconciliation while father was in the rehabilitation center. Their relationship was permanently severed in September 2003.

A judgment was entered in 2002 establishing mother and father were the biological parents of the children and granting mother sole legal and physical custody of the children. Father was granted reasonable visitation as agreed to by the parties. In 2001, father had substantial contact with the children. Mother could not recall father visiting with the children in 2002. Father visited the children during the period he and mother attempted to reconcile in 2003, which lasted a few months. Father did not visit the children from October 2003 until August 2005. Father visited the children twice in August 2005, each visit lasting about 90 minutes. The visits were arranged after father called and asked to see the children. There also was an occasion in December 2005 when father had a brief unplanned encounter with the children at a restaurant. Father sought additional visits with the children in 2005.

Mother received approximately four letters from father in 2004. She returned the letters to father because she did not want the children to become emotionally invested in father since his involvement in their lives had been inconsistent and he was in prison. In 2005, mother received approximately three letters from father, which mother handled in

the same manner as the previous letters. In addition, father made approximately three phone calls to mother in 2005 and again began calling her in June 2008. Father has not given the children gifts since 2002.

Mother did not keep her phone number or address from father.

Mother obtained an order requiring father to pay child support in 1999. She received a check in 2003 for \$178. In 2003, the parties agreed father would not have to pay support. In April 2004, a new court order was entered requiring father to pay support. Father did not make any child support payments. In April 2004, mother received two checks totaling approximately \$412 from father's income tax refunds. The next child support payment received from father was \$15 in July 2008. Mother continued to receive payments after July 2008. The total amount received from father for child support since 2000 was approximately \$950. In addition, father's family gave mother \$300 on one occasion. Father has not made any other significant monetary contributions to the cost of raising the children.

Mother obtained restraining orders against father in 1998 and 2003. The 2003 restraining order prohibited father from having contact with the children unless supervised. The visits had to be agreed to by the parties.

Father contacted mother in 2008 after he was released from prison. Mother told him she would talk with the children and get back to him. Mother tried to call him back on one occasion but did not leave a message and would not return the phone calls he made to her.

III. Father's Testimony

As relevant, father and mother lived together when father was released from drug rehabilitation in March 2003. They separated in October because they were arguing often. While father was incarcerated, he wrote to the children on numerous occasions, with the letters being returned to him.

After father was released in June 2008, he contacted mother within a week. Mother said she would not let him see the children until she could determine if he was serious about straightening out his life. Mother asked for time, and father agreed. Mother did not call father, and she would not return his calls. When mother did not call, father contacted Attorney Daniel Bern to attempt to get a court order allowing visitation. Father also enrolled in a parenting class to become a better father.

IV. Father's Attorney's Testimony

Father retained Bern in September 2005 to file a motion to permit him to have visits with the children. Bern did not file any paperwork at the time because he lost contact with father. Bern learned father was in prison and, since he did not have any contact with father, he did not do anything. Bern next saw father in August 2008 about visitation with his children. Bern filed a motion to establish parentage and to permit father to visit with the children. Mother filed a responsive pleading indicating a visitation order already was in place. Father told Bern he was unaware of the order. When the hearing on the motion Bern filed was heard, the family court stayed the matter because stepfather had filed an adoption request.

V. Patricia Hernandez

Patricia Hernandez is a parenting facilitator with a local agency. Father was a student in one of her parenting courses. He attended regularly and participated well in class. He had completed approximately one-half of the classes in the course at the time of the hearing.

VI. Paternal Grandparents' Testimony

The paternal grandparents testified that their attempts to see the children were rebuffed by mother. When they attempted to bring gifts to the children, mother refused to accept them, and letters and cards were returned unopened.

Paternal grandmother also authenticated 63 letters she had received from father, each expressing an interest in the children. Father would ask for pictures and about the children's lives.

VII. The Family Court's Ruling

The family court issued a written ruling that it adopted as its statement of decision. It discerned from the case law two principles to guide its decision. First, the family court concluded that the interests of the children were the most important concern. Second, the family court acted to protect not a biological relationship, but a parental relationship. From these principles the family court concluded the issue was not whether father consciously decided to cease supporting or communicating with the children, but whether he “voluntarily abdicated the parental role.”

The family court concluded the case law established that a biological parent could not claim an inability to communicate or support a child because of volitional acts that prevented the biological parent from doing so; i.e., a parent's incarceration does not excuse the failure to support or communicate with one's children.

The family court then found that father never provided financial support for the children, even when he was not incarcerated. The payments that were made were described as “token” amounts. The family court concluded that father willfully failed to support the children by clear and convincing evidence.

The family court also found that father made few attempts to contact the children. When he was not incarcerated, he did not attempt to enforce the court-ordered visitation, instead “choosing drugs.” The family court found significant that in the preceding six years father had spent only three hours with the children. The family court concluded

that father had willfully failed to communicate with the children for a period in excess of one year.

Based on these findings, the family court granted the petitions to terminate father's parental rights under sections 7822 and 8604.

DISCUSSION

Applicable statutes

The family court based its decision on sections 7822 and 8604. Section 7822 permits the family court to terminate the parental rights of a biological parent if, as relevant here, the biological parent left the child in the sole custody of the other parent for one year and failed to provide support or communicate with the child, with the intent to abandon the child. (§ 7822, subd. (a)(3).) Section 8604 provides that a biological parent's consent to an adoption is not necessary if (1) one biological parent has been awarded custody by judicial order or agreement of the parties, (2) that biological parent consents to the adoption, and (3) the other biological parent fails to provide support for the child and fails to communicate with the child for a period of one year. (§ 8604, subd. (b).)

Standard of review

We review the family court's decision to determine whether it was supported by substantial evidence. Our review of the sufficiency of the evidence is deferential. We “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find [in favor of the prevailing party].” [Citation.]” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the

evidence that supports the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We will not substitute our evaluations of a witness's credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

Father's voluntarily leaving the children with mother

Father contends there was not substantial evidence to support the finding that he left the children with mother within the meaning of section 7822. He argues that because there was a court order awarding custody of the children to mother, he did not leave the children with her, but merely acquiesced in a court order.

The record does not support this argument. While there was a court order, several in fact, awarding mother sole custody of the children, these orders were not issued until after father left the family for the first time. The first judgment awarding mother custody of the children was entered in 2002. Father and mother ceased living together in 1998. From 1998 to 2002 mother had custody of the children without the benefit of a court order.

There was evidence of father's leaving the children with mother again in 2003. Despite the existence of the court order, mother and father attempted to reconcile in 2003. When this attempt failed, father again voluntarily left the residence. Father did not make any attempt to regain custody of the children before his next incarceration. Again, this was evidence that father left the children with mother. The family court's finding that father voluntarily left the children with mother was supported by substantial evidence.

Father's failure to support the children

We next turn to the issue of support. We think it is dispositive. The family court found that father's efforts at support were only token efforts. The record supports that finding. Father did not pay any support for the children voluntarily until 2008. Granted, for much of that time he was incarcerated. Father argues his incarceration excused him from supporting his family. He relies on *Adoption of Coffee* (1976) 59 Cal.App.3d 593 (*Coffee*) to support his argument. In *Coffee*, the child's father was incarcerated for all

relevant times. The family court found that the father did not have the ability to pay for child support during his incarceration. Nonetheless, the family court concluded that the father willfully failed to pay support because he willfully committed the crime that led to his inability to pay child support. (*Id.* at pp. 598-599.) The appellate court reversed, concluding that unless the father committed the crime for the purpose of avoiding his child support obligation, then his failure to pay child support was not “willful” as that word is used in the statute. (*Id.* at p. 599.)

The family court here relied on *Adoption of Allison C.* (2008) 164 Cal.App.4th 1004 (*Allison C.*) to reject *Coffee*. *Allison C.* was based on facts similar to those present in this case. The stepfather was seeking to adopt the child with the mother’s consent. The father, who had been in and out of prison for most of the child’s life, objected to the adoption. The mother had custody of the child. The family court found that the father had left the child with the mother and had failed to provide support or communicate with the child for a period in excess of one year with the intent to abandon the child. The family court terminated the father’s parental rights pursuant to section 7822. (*Allison C.*, at p. 1009.) The father argued the family court’s order was not supported by substantial evidence. The appellate court disagreed. As pertinent to this issue, in rather summary fashion, the appellate court concluded that there was substantial evidence to support the conclusion that the father failed to support the child for the statutory period. (*Id.* at p. 1012.)

We do not think that *Allison C.* can be read as broadly as the family court did in this case. The lack of any consideration by the appellate court of the potential argument that the lack of support could be excused because of father’s incarceration precludes any conclusion that the case overrules *Coffee*. Indeed, the summary treatment of the issue prevents reliance on the case as authority for any proposition related to incarceration. Nonetheless, *Allison C.*, because of its factual similarity, does provide some guidance. The relevant similarity between *Allison C.* and this case is that in both cases the parent

was in and out of prison, *and while out of prison neither parent attempted to provide any support for the children.*

However well-intentioned father's efforts might have been, they fall short of the legal requirements necessary to avoid the conclusion reached by the family court here. Father's failure to provide support for the children while he was not incarcerated provided substantial evidence that he did not support his children for the statutory period. That he was incarcerated for a portion of the period does not excuse his lack of effort to support the children while not incarcerated. This fact also distinguishes *Coffee*, where the father was incarcerated for the entire statutory period.

CONCLUSION

Section 7822 requires the family court to find that father either failed to communicate with the children for a period of one year with the intent to abandon the children, *or* failed to support the child for a period of one year with the intent to abandon the children. Since there was substantial evidence to support the family court's conclusion that father failed to support the children for a period of one year with the intent to abandon the children, we need not consider the issues of communication and the requirements of section 8604.

DISPOSITION

The order terminating R.B.'s parental rights is affirmed.

CORNELL, J.

WE CONCUR:

WISEMAN, Acting P.J.

POOCHIGIAN, J.